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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 30

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLEES.

BRIEF FOR APPELLEES.

HERBERT A. TAYLOR,
MARION B. PIERCE,
Counsel for Appellees.

OCTOBER, 1929.

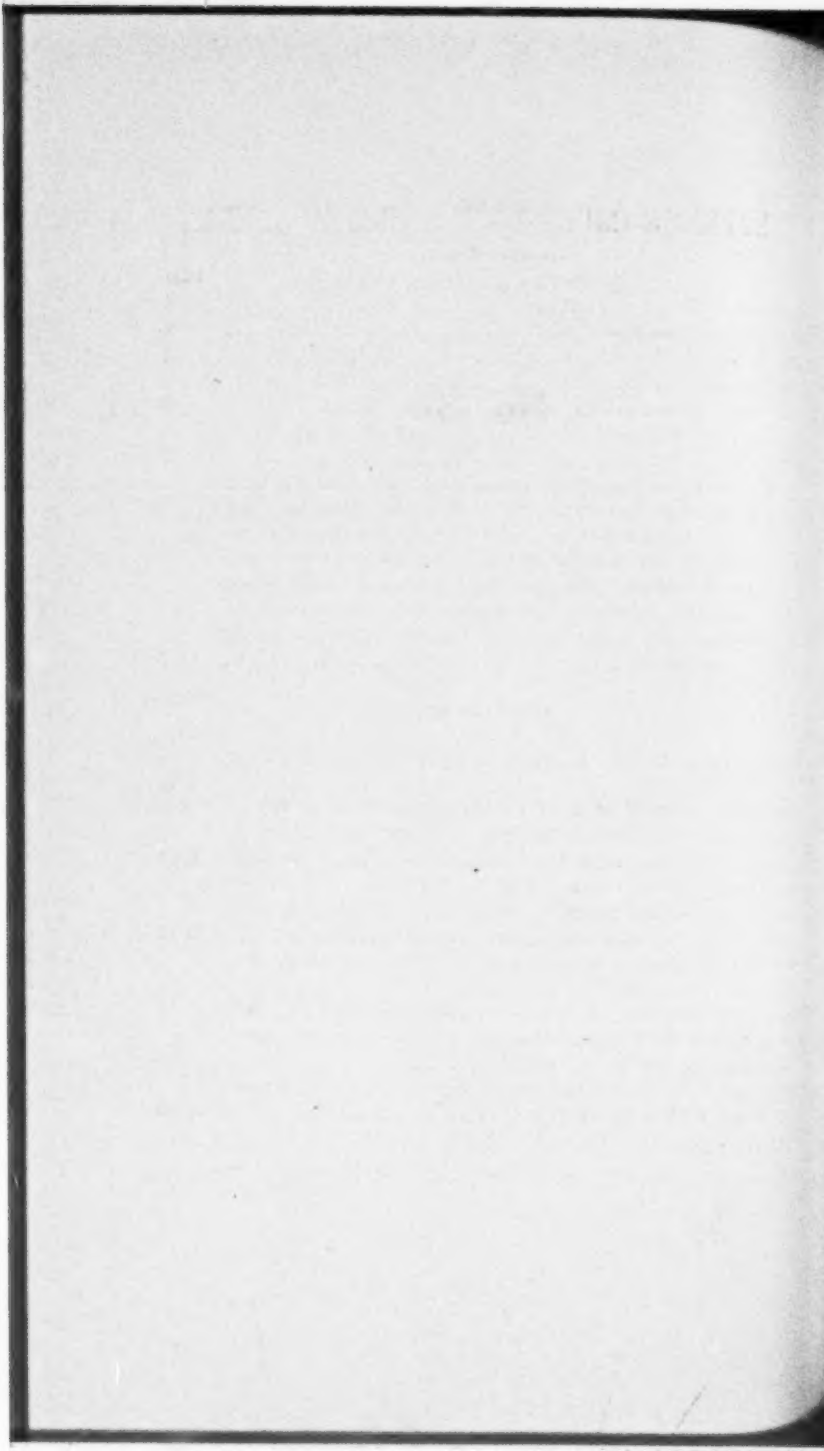
INDEX.

Subject Index.

	Page
Opinions	1
Statement of the case	2
The issue	2
The statute	2
The facts chronologically stated	3
Summary of argument	6
Argument	7
The rail transportation of the wood pulp from Hoboken to Garfield was intrastate, so that the Interstate Commerce Commission was without jurisdiction to find the rate charged therefor unreasonable and/or to fix a rate for the future. Therefore the decree of the court below, annulling, enjoining, and setting aside the order of the Commission attempting so to do, was proper and should be affirmed	7

Cases Cited.

Atlantic Coast Line R. R. Co. vs. Standard Oil Co., 275 U. S., 257	6, 7, 10
Baltimore & Ohio S. W. R. R. Co. vs. Settle, 260 U. S., 166	6, 7
Carson Petroleum Co. vs. Vial, 279 U. S., 395	17
Chicago, Milwaukee & St. Paul Rwy. vs. Iowa, 233 U. S., 334	6, 12
General Oil Co. vs. Crain, 209 U. S., 211	6
Gulf, Colorado and Santa Fe Rwy. Co. vs. Texas, 204 U. S., 403	6, 13
Railroad Commission of Louisiana vs. Texas and Pacific Rwy. Co., 279 U. S., 336	15
Railroad Commission of Ohio vs. Worthington, 275 U. S., 101	14
Southern Pacific Terminal Company vs. Interstate Commerce Commission, 219 U. S., 498	15
Texas and New Orleans Railroad Company vs. Sabine Transit Company, 227 U. S., 111	16



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ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEES.

Opinions.

The written opinion of the specially constituted United States District Court for the District of New Jersey, dated December 26, 1928 (R. 26-29) is reported

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in 32 F. (2nd) 613 under the title: *Erie Railroad Company et al. vs. United States.*

The reports of the Interstate Commerce Commission appear under the title: *The Hammersley Manufacturing Company vs. Erie Railroad Company et al.*, in 126 I. C. C. 491 (R. 14-20), and 148 I. C. C. 47 (R. 7-13).

Statement of the Case.

This is an appeal from the final decree of the United States District Court for the District of New Jersey annulling, setting aside, and suspending an order of the Interstate Commerce Commission dated November 2, 1928, requiring the establishment of a rate of 10 cents per 100 pounds on imported wood pulp, in carloads, from Hoboken, N. J., to Garfield, N. J. While the transportation for which the Commission prescribed this rate of 10 cents per 100 pounds was wholly within the state of New Jersey, it found and held that the transportation was from a foreign country to a place in the United States, over which the Commission had jurisdiction.

The Issue.

The sole issue here is legal, not factual, and it is: Was the transportation interstate or foreign, or was it intrastate? If the latter, then the Commission has no jurisdiction.

The Statute.

The governing statute is found in Section 1 of the Interstate Commerce Act, which, so far as pertinent here, provides:

NOTE.—Italics ours throughout.

"That the provisions of this Act shall apply to common carriers engaged in—

(*a*) The transportation of passengers or property wholly by railroad, * * * from or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States.

(2) The provision of this Act * * * shall not apply—

(*a*) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid; * * *."

The Facts Chronologically Stated.

The Hammersley Manufacturing Company uses in its plant at Garfield, N. J., in the manufacture of paper, foreign wood pulp (R. 36). It buys this pulp from dealers in New York City (R. 40). The course of the complete transaction here involved was as follows:

The Hammersley Company offered to buy from the New York dealer a particular grade or grades of foreign wood pulp (R. 40, 42, 45). The latter cabled this fact to the foreign producer and when he received an acceptance of his (the dealer's) offer he advised the Hammersley Company accepting its offer (R. 45-46),

and executed a contract *in his own name and for his own account* to sell and deliver the wood pulp to the Hammersley Company "On dock" or "Ex dock," New York Harbor, on the terms shown in the typical contract of record (R. 46, 63, 66). This contract is with the New York dealer and it provides for payment within 30 days after date of the New York dealer's invoice (R. 63, 66). The Hammersley Company does not know where the wood pulp is to come from or from what producer, although it may later learn where it came from (R. 41). The fact of the Hammersley Company's offer to the New York dealer to buy from him and the fact as to any and all offers the dealer then had from others to purchase wood pulp from him were included in the cable sent to the foreign producer (R. 47).

The wood pulp was loaded on the steamer in the foreign port and when the vessel cleared that port, the New York dealer paid the foreign producer for it (R. 47). All of the wood pulp on the steamer, so purchased by the New York dealer, was shipped under one bill of lading made out to him (R. 46-47). The bill of lading specified only the quantity on the ship (R. 47). The packages were marked so as to indicate the grade or quality, but were not marked in any way to designate that they were for the Hammersley Company or for any other (R. 43). Also all of it was billed to the New York dealer on one invoice (R. 47).

When the wood pulp arrived in Hoboken the steamer unloaded it onto its pier (R. 49) and the New York dealer was given an arrival notice by the steamship

company (R. 50). He did not ship it immediately to the Hammersley Company, but informed them of its arrival and awaited their instructions as to when to ship and how much to ship at one time (R. 43, 44, 45). When he received such instructions he made out a railroad bill of lading for the movement from Hoboken to Garfield and an order on the steamship company to deliver the proper quantity from a certain lot to Appellee Hoboken Manufacturers' Railroad Company, and delivered these documents to that company (R. 46, 49). The delivery order, or dock order, read to deliver so many bales of wood pulp "Ex steamship So and Co," the words "Ex steamship So and So" being put on the delivery order by the New York dealer so that the steamship people would know from what lot the wood pulp was to be taken (R. 49).

The Hoboken Manufacturers' Railroad Company then presented this order to the delivery clerk of the steamship company and when physical possession of the wood pulp called for by it was obtained executed the railroad bill of lading (R. 49-50). No bills of lading, delivery orders, or shipping instruction of any kind whatever are ever received by Appellees until after the steamer has arrived and has unloaded the wood pulp (R. 49). The wood pulp was then transported by Appellees to Garfield, the movement being wholly within New Jersey (R. 39).

The wood pulp not shipped each day remains on the steamship company's pier until the New York dealer furnishes further shipping instructions. As a matter

of fact some of it lays on the dock for several days (R. 45, 50, 51).

The 6th-Class rate was charged (R. 55).

The railroad bill of lading names the New York dealer as the shipper and the Hammersley Company as consignee (R. 56-57).

Summary of Argument.

THE RAIL TRANSPORTATION OF THE WOOD PULP FROM HOBOKEN TO GARFIELD WAS INTRASTATE SO THAT THE INTERSTATE COMMERCE COMMISSION WAS WITHOUT JURISDICTION TO FIND THE RATE CHARGED THEREFOR UNREASONABLE AND/OR TO FIX A RATE FOR THE FUTURE. THEREFORE THE DECREE OF THE COURT BELOW, ANNULLING, ENJOINING AND SETTING ASIDE THE ORDER OF THE COMMISSION ATTEMPTING SO TO DO WAS PROPER AND SHOULD BE AFFIRMED.

Atlantic Coast Line R. R. Co. vs. Standard Oil Co., 275 U. S. 257.

Baltimore & Ohio S. W. R. R. Co. vs. Settle, 260 U. S. 166.

Chicago, Milwaukee & St. Paul Rwy. vs. Iowa, 233 U. S. 334.

General Oil Co. vs. Crain, 209 U. S. 211.

Gulf, Colorado and Santa Fe Rwy. Co. vs. Texas, 204 U. S. 403.

ARGUMENT.

THE RAIL TRANSPORTATION OF THE WOOD PULP FROM HOBOKEN TO GARFIELD WAS INTRASTATE SO THAT THE INTERSTATE COMMERCE COMMISSION WAS WITHOUT JURISDICTION TO FIND THE RATE CHARGED THEREFOR UNREASONABLE AND/OR TO FIX A RATE FOR THE FUTURE. THEREFORE THE DECREE OF THE COURT BELOW, ANNULLING, ENJOINING AND SETTING ASIDE THE ORDER OF THE COMMISSION ATTEMPTING SO TO DO, WAS PROPER AND SHOULD BE AFFIRMED.

This court has in several cases decided the question of whether certain commerce was interstate or foreign on the one hand, or intrastate on the other hand, and the governing rule of law is well settled. In its opinion in *Baltimore and Ohio Southwestern R. R. Co. vs. Settle,* 260 U. S. 166, the court declared (p. 170):

> "Whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement."

In its opinion in *Atlantic Coast Line R. R. Co. vs. Standard Oil Co.,* 275 U. S. 257, 268, the court declared:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending

> to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of a movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars."

In the same opinion (pp. 268-269), the court stated:

> "* * * the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it."

These are the rules of law applied by the court below, and we submit that when the whole group of facts in respect to the commerce here involved is weighed, it will be found that the court below was correct in its finding that:

> "In the present case the essential character of the transaction is in intrastate and not interstate commerce" (R. 29).

The Hammersley Manufacturing Company offers to purchase from the New York dealer foreign wood pulp of a certain grade or quality at a certain price delivered to it on the steamship's dock in New York Harbor, which in this case is Hoboken, N. J. When so doing, it does not know who the foreign producer is to be. Nor does it always know where the pulp is to be produced or even from what port it is going to be shipped. Others have made offers to the same dealer to purchase from him other wood pulp. The dealer combines all these offers in one cable to the foreign

producer naming each of the parties who have offered to buy from him. The foreign producer cables the New York dealer an acceptance of the latter's offer who then notifies the Hammersley Company (and the others) of his acceptance of their offer and executes written contracts covering the purchase and sale. The foreign producer loads all of the pulp sold to the New York dealer on the steamer at the foreign port in one lot, not marked for the Hammersley Manufacturing Company or for anyone else, but without any distinguishing marks, except marks to indicate the grade or quality. All of it, that which the Hammersley Company has offered to buy from the dealer as well as that others have offered to buy from him, is consigned to the dealer at New York on a single ship's bill of lading and all of it is invoiced to the New York dealer on one invoice. As soon as the ship clears the foreign port the New York dealer pays the foreign producer for it. It is to be noted that under his contract with the Hammersley Manufacturing Company, delivery is "Ex dock" New York Harbor and the payment by the latter to the former is 30 days or more after the date of the invoice or trade acceptance (R. 63, 66). On arrival of the wood pulp at Hoboken it is unloaded by the steamer onto the steamer's pier, *not a pier of appellees.* The New York dealer having been notified of its arrival notifies the Hammersley Company which gives him, *not appellees,* orders for shipment as it desires. The dealer does not ship it all out promptly, but some or all of it lays on the pier at Hoboken several days at a time. When, pursuant to his arrange-

ment with the Hammersley Company, the dealer is to ship some of the wood pulp to Garfield he prepares a railroad bill of lading for the movement from Hoboken to Garfield and a dock order (an order to the steamship company to deliver to appellees) and delivers both to the Hoboken Manufacturers' Railroad which thereupon presents the order, obtains physical possession of the wood pulp to be transported and executes the bill of lading which shows the New York dealer as the shipper and the Hammersley Manufacturing Company at Garfield as the consignee.

This whole group of facts, we respectfully submit, shows that the transportation for which the Commission has here sought to reduce the rate for the future and award reparation for the past is intrastate. The interstate or foreign commerce was terminated when the steamer unloaded the wood pulp onto its Hoboken pier. The contract between the foreign producer and the New York dealer, and that between the steamship company and the New York dealer, were completely performed.

Thereafter this dealer distributed by means of dock orders or otherwise so much of this grade or quality to this one of his purchasers and so much to that one and so much to the Hammersley Company as his contracts with them required.

As the court below rightly held on these facts, the essential character of the transaction is in intrastate commerce.

In *Atlantic Coast Line R. R. Co. vs. Standard Oil Company, supra,* the facts are stated as follows:

"The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate, and there is nothing in the history of the whole transportation which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville or the St. Johns River Terminal."

It was held that the rail transportation within Florida from the Florida seaboard points to the Florida inland points was intrastate.

That case rules this one. There the seller, the foreign oil producer, sold and shipped direct to the Standard Oil Company which itself distributed the oil from the seaboard to the interior. Here, the seller, the foreign wood pulp producer, sold and shipped, not to

the Hammersley Company but to the New York dealer who distributed to the Hammersley Company and to others after the wood pulp had been unloaded on the docks. The rail shipment was a separate, independent and intrastate transaction.

Further, at page 269, the Court says:

> "Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations, is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it."

Here everything that is done after the ship's load of wood pulp is unloaded by it onto its dock, is done in the distribution of the wood pulp to serve the purposes of the New York dealer who then owned it and who imported it.

Our case is stronger than was that of *Chicago, Milwaukee & St. Paul Rwy. vs. Iowa,* 233 U. S. 334. There shipments of coal had been made from points outside the state to Davenport, Iowa. The Davenport, Iowa, consignee desired to reconsign the shipments on arrival at Davenport in the same cars to points within Iowa, the transportation to which would cover a movement solely within Iowa. The Railroad Company refused to accept orders for such reconsignment and refused to transport the traffic. On complaint the Iowa Railroad Commission prohibited this practice and ordered that it be stopped. The Railroad Company refusing to obey that order, the state of Iowa sought a mandatory injunction requiring compliance.

The case came to the United States Supreme Court on the question of whether or not the commerce involved was interstate. If it were interstate, the Iowa Railroad Commission was without jurisdiction. The Court held that the State Commission did have jurisdiction, as the shipments were not interstate, Davenport being a distributing point for the coal shipped by the consignor. It was the view of the Court that the fact that commodities in interstate shipment were shipped by the consignee in the very same cars in which they had arrived, did not establish a continuity of movement, so that the reshipment within the State would not have an independent and intrastate character.

Also it is stronger than was that of *Gulf, Colorado and Santa Fe Rwy. Co. vs. Texas,* 204 U. S. 403, where the facts were that a grain dealer of Kansas City, having sold a car of corn for delivery in Goldthwaite, Tex., bought two cars of corn which were shipped from Hudson, S. Dak., consigned to him at Texarkana, Texas. Upon arrival of the two cars at Texarkana, he shipped one of them to Goldthwaite, in fulfillment of his contract. Although the shipment and transportation from Texarkana, Tex., to Goldthwaite, Tex., was in the same car and followed upon the interstate transportation from Hudson, S. Dak., to Texarkana, Tex., the Court held the intrastate rate applicable to the Texarkana-Goldthwaite movement, on the ground that it was an independent movement and not a continuation of the interstate movement.

Here the fact is that the New York dealer had shipped to him by steamer on one bill of lading many bales of wood pulp and upon arrival at Hoboken and unloading on the steamship pier there, he segregated and shipped under a new contract made with the appellees, some of that wood pulp to Hoboken, N. J., in fulfillment of his contract with the Hammersley Company.

The appellants rely upon two lines of decisions to support their contentions here. In one of them the question was as to whether the Interstate Commerce Act applied to the transactions there involved, and in the other the question was as to whether property moving in interstate commerce could be subjected to local taxation.

Each of these cases is so different in its facts from the facts in this case that none is apposite.

For example:

In *Railroad Commission of Ohio vs. Worthington*, 275 U. S. 101, the rail carriers had published a rate on coal from Ohio mines to Huron, Ohio, of 90 cents per ton when loaded on vessels for movement to other states or to Canada, and of $1.00 per ton when for commercial use at Huron. Upon complaint after hearing the Ohio Railroad Commission reduced the rate to 70 cents per ton on "Lake Cargo Coal" for transportation from the mines to the port (Huron), unloading from the cars and loading upon the vessel and then trimming the load. The facts were that the coal was necessarily shipped beyond the port to other states and to Canada and that it remained in the pos-

session of the rail line in the car until the rail carrier loaded it into the vessel. Clearly this was continuity of movement.

In *Railroad Commission of Louisiana vs. Texas and Pacific Rwy. Company*, 229 U. S. 336, the shipments moved on local bills of lading, but were delivered direct by the railroad company to the steamship company. They were, under the tariff, accorded 20 days' free time as distinguished from 4 days' free time accorded to domestic freight; they paid the handling charge, which, under the tariff, was applied to export shipments, but did not apply on domestic freight. It was held that the fact that the shipments moved under local bills of lading did not divest them of their export character; that there was a continuity of movement, and no interruption of the transportation to the foreign destination beyond what was necessary for transshipment at New Orleans.

In *Southern Pacific Terminal Company vs. Interstate Commerce Commission*, 219 U. S. 498, the shipment was by rail to the port from Young to Young and by water to the foreign country from Young to Young's order. Young bought cottonseed cake and meal at points within and without the State of Texas and shipped it to himself at Galveston. There he had use of a wharf belonging to the Terminal Company, which was held to be a part of the line haul of the rail carriers, for the handling of his cottonseed cake and meal. His competitors were denied such use of this wharf. The court held that this was an undue preference in giving to Young the use of the wharf facilities and

denying it to others. There was no distinction between the cottonseed meal bought or *shipped from points outside of Texas,* and the cottonseed cake bought in Texas, shipped to Galveston, there manufactured into meal and then exported. It was found that the manufacture or concentration on the wharf, under those circumstances, in the transshipment of the articles in export trade, were but incidents in the transportation. In other words, the Terminal Company being a part of the line-haul carrier, and some of the traffic having moved from points outside of Texas for transshipment across the wharf at Galveston, clearly the provisions of the Interstate Commerce Act were applicable.

In *Texas and New Orleans Railroad Company vs. Sabine Transit Company,* 227 U. S. 111, a lumber dealer at Sabine sold lumber for delivery in Europe. It was shipped to him by rail from points within Texas on way bills marked by the railroad "for export." On arrival at Sabine it was unloaded onto the railroad docks or into its slips in reach of ship's tackle, ready for loading on the ship. The tariff provided a switching charge, which was assessed on domestic shipments but was absorbed out of the rate on foreign shipments. This charge was not assessed, but was absorbed. The tariffs provided for a storage charge to be assessed on domestic freight if not removed from the railroad's premises when unloaded. No such charge was assessed. There was no local trade or consumption at Sabine. In the case at bar there was a local trade on the docks (R. 41).

Of the second line of decisions referred to *supra*, *Carson Petroleum Co. vs. Vial*, 279 U. S. 395, is typical. There a state tax was assessed on a quantity of oil in storage tanks at St. Rose, Louisiana. The taxation was contested on the ground that it was an interference with interstate and foreign commerce. The court said (p. 101):

> "The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit."

The oil was purchased in states other than Louisiana and received interstate rail movement up to St. Rose at an export rate lower than the domestic rate. The above quotation from the opinion shows there was no doubt but that the oil was moving in interstate commerce, and that the only question was whether holding it at St. Rose awaiting the arrival of a ship or the accumulation of a sufficient quantity to load a ship was such a break in the continuity of interstate transportation as to render it subject to the local tax laws. The court held it was not.

This and the other cases of the same nature afford no judicial support for the appellants' contentions here.

The decree of the lower court should be affirmed.

HERBERT A. TAYLOR,
MARION B. PIERCE,
For Appellees.